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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001321-MR

VOGT POWER INTERNATIONAL, INC. APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 16-CI-00526

LABOR DEPARTMENT OF WORKPLACE STANDARDS; DAVID A. DICKERSON IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE KENTUCKY LABOR CABINET;[1] and STEPHEN KAPSALIS APPELLEES

OPINION
AFFIRMING IN PART AND
VACATING IN PART

** ** ** ** **

BEFORE: DIXON, KRAMER, AND K. THOMPSON, JUDGES.

[1] During the pendency of this appeal, David A. Dickerson, in his official capacity as Acting Secretary of the Kentucky Labor Cabinet, was substituted for the prior appellee, Derrick Ramsey, in his official capacity as Secretary of the Kentucky Labor Cabinet.

KRAMER, JUDGE: In an April 12, 2016 final administrative order, the Secretary of the Kentucky Labor Cabinet determined that appellant Vogt Power International, Inc., violated Kentucky Revised Statute (KRS) 337.055[2] by wrongfully withholding wages belonging to Vogt's former employee, Stephen Kapsalis. Vogt petitioned the Franklin Circuit Court for review and declaratory relief, and the circuit court affirmed. Vogt now appeals to this Court, and for the reasons set forth below we affirm in part and vacate in part.

The general background of this wages and hours matter is relatively straightforward. As conceded by all parties to this appeal, Stephen Kapsalis was the type of "employee" classified as a "bona fide executive" as set forth in KRS 337.010(2)(a)2; to that end, he served as Vogt's President and CEO from July 2009 until April 12, 2013, and he was paid $350,000 per year for his services. Kapsalis operated Vogt for its parent corporation, Babcock Power. Months after his resignation, Kapsalis filed a complaint with the Cabinet alleging that Vogt had

[2] KRS 337.055 provides:

> Any employee who leaves or is discharged from his employment shall be paid in full all wages or salary earned by him; not later than the next normal pay period following the date of dismissal or voluntary leaving or fourteen (14) days following such date of dismissal or voluntary leaving whichever last occurs. Any employee who is absent at the time fixed for payment by an employer, or who, for any other reason, is not paid at that time, shall be paid thereafter at any time or upon fourteen (14) days' demand. No employer shall, by any means, secure exemption from this section.

violated KRS 337.055 by failing to pay him $8,788.62 in wages, an amount representing 58 hours of his accrued annual leave. After investigating Kapsalis's complaint, the Cabinet then issued tentative findings of fact on February 25, 2014. In its findings, the Cabinet concluded that Vogt had indeed violated KRS 337.055 by failing to pay Kapsalis $8,788.62 for 58 hours of accrued annual leave. Accordingly, the Cabinet directed Vogt to pay a civil penalty of $250, and to pay Kapsalis $8,788.62 in restitution. Thereafter, Vogt administratively contested the tentative findings of fact;[3] an evidentiary hearing was held; the Secretary of the Cabinet ultimately affirmed the penalty and amount of restitution in an April 12, 2016 final order; and, following a petition for judicial review,[4] the Franklin Circuit Court likewise affirmed.

We pause here to note that in *part* of this appeal, Vogt argues that no evidence of substance supports that it owed Kapsalis $8,788.62 in unpaid wages, or that it otherwise violated or should have been penalized for violating KRS 337.055. For the sake of brevity, we will address that part first. The Secretary's April 12, 2016 final order set forth the evidence and applied the law in relevant part as follows:

[3] *See generally* 803 Ky. Admin. Regs. (KAR) 1:035; KRS 337.310.

[4] *See* KRS 13B.140.

Mr. Kapsalis accrued annual leave pursuant to Babcock Power's vacation policy. Mr. Kapsalis stated the accrual occurred at a rate of 160 vacation hours per year. Mr. [John] Heffernan[5] confirmed that figure on direct examination. Each year, Mr. Kapsalis was allowed to carry over up to two times the maximum amount of hours accrued annually.

Mr. Kapsalis had an accrued annual leave balance of 168 hours at the time of his separation from employment of Petitioner. Mr. Kapsalis's claimed balance of 168 hours was substantiated by Mr. Heffernan on direct examination when he stated: "So based on accruing 160 hours a year, having over 160 hours upon departure, it did seem like a lot."

Petitioner's counsel asked on direct examination of Mr. Heffernan: "Why did you do an investigation after Mr. Kapsalis left and make a decision not to pay him the total amount of vacation pay?" Mr. Heffernan responded not by claiming Petitioner paid the total amount of vacation pay but rather went on at length as to why the internal investigation was performed. This exchange shows there is no dispute that Mr. Kapsalis's original leave balance upon departure was 168 hours as he claimed. It also confirms that Petitioner disliked how large the balance was and refused to pay the total balance.

Petitioner did make a payment for one-hundred-ten (110) hours of accrued vacation time earned. However, Petitioner failed to pay a balance of fifty-eight hours remaining for accrued annual leave. Mr. Heffernan wrote Investigator Blevins on August 6, 2013, stating in relevant part: "Mr. Kapsalis was paid for 110 hours of accrued vacation time." Mr. Heffernan went on to state in that letter: "We refute the additional 58 hours of accrued time Mr. Kapsalis is claiming."

[5] John Heffernan was at all relevant times the chief human resources officer for Babcock Power and its subsidiary, Vogt.

As there was a total balance of 168 hours of accrued annual leave for Mr. Kapsalis upon his separation from Petitioner, and he was only paid for 110 hours of that leave, payment for 58 hours of leave is still due to Mr. Kapsalis.

Petitioner refused to pay the remaining 58 hours of accrued leave due to Mr. Kapsalis based on its assertion that he incorrectly report[ed] his work time and sick time. This contention is detailed in a letter from Mr. Heffernan to Inspector [Michael] Blevins dated August 12, 2013. On two of the days in question, Mr. Kapsalis took sick leave while on an out-of-town business trip. Each of the other dates in question occurred on a day Mr. Kapsalis was out of the office, did not report business expenses, and took annual leave for at least part of that day, the day prior, or the following day.

Mr. Heffernan appeared to assume if Mr. Kapsalis did not report business expenses on his expense report that he must not have worked on the days in question. Specifically, he stated: "There was no indication that showed that there was any business that was being conducted while on travel because there were no expenses associated with those days." This assumption is not supported by testimony in the record.

When questioned as to whether he himself would report business expenses when working from home, Mr. Heffernan stated: "I wouldn't have any expense." The same holds true for Mr. Kapsalis if or when he was working from his homes in Louisville, Florida, or the property he leased in the Carolinas. Additionally, if Mr. Kapsalis was out of town for personal reasons, and he performed a half-day of work for Petitioner, there would not have been any added expense to report.

When questioned on the type of proof an employee is required to provide to show work was actually being

done while working outside of the office, Mr. Heffernan stated none was required. The exchange was as follows:

> Cabinet Counsel: "There's been a lot of talk about e-mails and phone calls while out of the office on the days in question. What proof is an employee required to present on a workday outside of the office to prove they worked?"
>
> Mr. Heffernan: "What are they required to prove?"
>
> Cabinet Counsel: "Is there a policy requiring employees to prove it?"
>
> Mr. Heffernan: "No."

Mr. Heffernan's understanding that there was not a proof requirement regarding work performed was echoed by Mr. Kapsalis. When questioned as to what records would be required to prove he worked when out of the office he stated: "None that I'm aware of."

While there is no requirement to provide proof of working when out of the office, there is proof Mr. Kapsalis performed work on each day in question where working hours were reported. For each day, there are numerous work phone calls and emails made by Mr. Kapsalis occurring over a number of hours. While the total time spent on work calls varies from day to day, the records prove Mr. Kapsalis was performing work on those days. Simply because Mr. Kapsalis was not on a business call at a given time is not proof he wasn't working at that time.

Petitioner's assertions that Mr. Kapsalis was hunting or traveling on a particular day are irrelevant. Both Mr. Kapsalis and Mr. Heffernan agree that there were not specific set hours which Mr. Kapsalis was required to

work by Petitioner. Both also agree that Mr. Kapsalis often worked both nights and weekends as part of his job. As such, any non-work activity that may have occurred on a given day during normal nine-to-five work hours is not determinative as to whether or not he was working on that day.

Petitioner asserts Mr. Kapsalis's report of sick leave was improper for March 6th and 7th of 2013. Mr. Heffernan stated on direct, "I just assumed again, since he is back in that same area that it was another long weekend hunting trip." This assumption is not credible. Mr. Kapsalis was there for a long weekend, yet the Petitioner did not question Monday and Tuesday (March 4th and 5th) or Friday (March 8th) which were reported as work days. Any lack of proof that Mr. Kapsalis worked on these days would be due to his illness. Nothing in the vacation policy would prevent Mr. Kapsalis from taking sick leave while on a business trip. In fact, had he even been on a personal vacation during this time and took ill, he would still be allowed to take sick leave. During cross-examination Mr. Heffernan confirmed this availability of sick time during a personal vacation.

Mr. Kapsalis reported his worktime each week as seen in his timesheets. Each of Mr. Kapsalis's timesheets was approved by an employee designated by Mr. Kapsalis's supervisor Mike LeClair. Petitioner had an opportunity to reconcile any perceived inconsistencies in Mr. Kapsalis's timesheets prior to approval, yet no claims were raised prior to his resignation.

Section 2.6.1 of the Babcock Power Vacation Policy states: "Employees who leave the company will be paid for unused vacation hours that have been accrued up to the termination date." Mr. Heffernan confirmed that it was Petitioner's policy to pay unused vacation time at an employee's separation of employment.

> Mr. Kapsalis was an employee of Babcock Power and was subject to the Babcock Power Vacation Policy. As such, the pay for his accrued annual leave was salary earned. Payment of those hours was therefore subject to the terms of KRS 337.055.
>
> Petitioner paid Mr. Kapsalis for 110 hours of annual leave on June 27, 2013. Mr. Kapsalis's employment with Petitioner ended on April 12, 2013. Petitioner still has not paid for the remaining 58 hours of accrued leave. Petitioner acknowledged it failed to pay Mr. Kapsalis within the required time in an email from John Heffernan to Investigator Blevins on October 29, 2013, which states in relevant part: "[A] delay of ten business days in paying 110 hours of vacation time does not seem unreasonable and something I hope you will consider." This delay in payment was also admitted in a prior email on October 16, 2013.
>
> Mr. Kapsalis's hourly rate pay was calculated by Investigator Blevins using the pay stub for 110 hours of annual leave which Petitioner did pay Mr. Kapsalis. Using the hourly rate calculated from the pay stub, and multiplying that rate by the 58 hours in question, Investigator Blevins determined Mr. Kapsalis was due $8,788.62 for unpaid accrued annual leave.
>
> Having reviewed the record, the Secretary finds that the Cabinet presented substantial, credible evidence and testimony as to the vacation time accrued by Mr. Kapsalis, and further finds that the evidence and testimony presented by the Petitioner was not credible, and failed to rebut the evidence presented by the Cabinet. Therefore, the Secretary finds that Mr. Kapsalis was not paid the initial payment for 110 hours or the remaining 58 hour balance of accrued annual leave within 14 days of Mr. Kapsalis's last day of employment, and therefore the Petitioner violated KRS 337.055.

(Internal record citations omitted).

In short, Vogt had no policy beyond the requirement of submitting a timesheet that required Kapsalis to prove the number of hours he worked while out of the office. Kapsalis verified the accuracy of each timesheet he submitted, which provided the basis of his accrued annual leave; and Vogt approved each of Kapsalis's timesheets prior to his resignation. According to those timesheets, Kapsalis was owed outstanding wages representing 58 hours of annual leave. Additionally, some objective evidence (*i.e.*, emails and telephone records) proved Kapsalis was performing work on days when Vogt assumed he was not working; and, while Vogt contended that Kapsalis was not working the full number of hours claimed, Vogt acknowledged its contention was based upon its own speculation.

As discussed, Vogt contends on appeal that the Cabinet erred in determining it violated KRS 337.055. We disagree. Our standard of review in this context is as follows:

> KRS 13B.150(2) requires that when reviewing an administrative agency's decision, "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." In fact, the court may only reverse an agency's final order, in whole or in part, . . . if it finds the agency's final order is:
>
> > (a) In violation of constitutional or statutory provisions;
> > (b) In excess of the statutory authority of the agency;
> > (c) Without support of substantial evidence on the whole record;

> (d) Arbitrary, capricious, or characterized by abuse of discretion;
> (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
> (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
> (g) Deficient as otherwise provided by law.
>
> KRS 13B.150(2).
>
> The judicial standard of review of an agency's decision therefore is largely deferential: "The . . . court's role as an appellate court is to review the administrative decision, not to reinterpret or to reconsider the merits of the claim, nor to substitute its judgment for that of the agency as to the weight of the evidence." *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 131 (Ky. App. 2006) (citation footnote omitted). When it comes to an agency's findings of fact, "[a]s long as there is substantial evidence in the record to support the agency's decision, the court must defer to the agency, even if there is conflicting evidence." *Id*. at 132.

Louisville/Jefferson County Metro Gov't v. TDC Group, LLC, 283 S.W.3d 657, 663 (Ky. 2009).

Considering that standard, the circuit court correctly determined there was no basis for setting aside the Cabinet's order. Substantial evidence supported the Cabinet's decision and the amount of restitution it ordered Vogt to pay Kapsalis, and we are not at liberty to reweigh that evidence. Moreover, the $250

penalty the Cabinet chose to assess Vogt was clearly within the bounds of its discretion. *See* KRS 337.990(3).

Having said that, we now turn to the second part of this appeal: Vogt contends that Kapsalis's status as a "bona fide executive" employee, taken in conjunction with KRS 337.385, precluded the Cabinet from ordering Vogt to pay a civil penalty or to make restitution to Kapsalis; from prospectively enforcing such an order; or from citing it for violating KRS 337.055.

Before chasing Vogt's logic, it is important to note at the onset that Vogt is incorrect. KRS 337.385 and Kapsalis's status as a "bona fide executive" have no bearing whatsoever upon this matter, nor any future penalty enforcement proceedings. With that in mind, KRS 337.385, titled "Employer's liability; unpaid wages and liquidated damages; punitive damages for forced labor or services," provides as follows:

> (1) Except as provided in subsection (3) of this section, any employer who pays any employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of such wages and overtime compensation, less any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages, and for costs and such reasonable attorney's fees as may be allowed by the court.
>
> (2) If, in any action commenced to recover such unpaid wages or liquidated damages, the employer shows to the satisfaction of the court that the act or omission giving

> rise to such action was in good faith and that he or she had reasonable grounds for believing that his or her act or omission was not a violation of KRS 337.020 to 337.285, the court may, in its sound discretion, award no liquidated damages, or award any amount thereof not to exceed the amount specified in this section. Any agreement between such employee and the employer to work for less than the applicable wage rate shall be no defense to such action. *Such action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself, herself, or themselves.*
>
> (3) If the court finds that the employer has subjected the employee to forced labor or services as defined in KRS 529.010, the court shall award the employee punitive damages not less than three (3) times the full amount of the wages and overtime compensation due, less any amount actually paid to such employee by the employer, and for costs and such reasonable attorney's fees as may be allowed by the court, including interest thereon.
>
> (4) At the written request of any employee paid less than the amount to which he or she is entitled under the provisions of KRS 337.020 to 337.285, the commissioner may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court. The commissioner in case of suit shall have power to join various claimants against the same employer in one (1) action.

(Emphasis added).

Pointing to the fact that KRS 337.385 is designed to remedy violations of "KRS 337.020 to 337.285," Vogt asserts that the Cabinet's authority to compel

it to pay unpaid wages to employees, or for that matter any kind of civil penalty for violating KRS 337.055, must therefore derive from KRS 337.385. Seizing upon that flawed premise, Vogt notes that KRS 337.385 does not apply to employees who, like Kapsalis, qualify as "bona fide executives." *See* KRS 337.010(2)(a)2. Therefore, Vogt reasons, the Cabinet's decisions to compel it to pay restitution to Kapsalis, and to assess it with a civil penalty for violating KRS 337.055, were legal nullities.

As noted, however, KRS 337.385 has no bearing whatsoever upon this matter, nor upon any future penalty enforcement proceedings from the Cabinet. As to why, the meaning of the language "[s]uch action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself, herself, or themselves" is plain and unambiguous – it indicates that *apart* from any future penalty enforcement proceedings from the Cabinet, a *private* cause of action lies in circuit court for recovery of KRS 337.385 damages. Indeed, the statute refers to "any action commenced to recover such unpaid wages *or* liquidated damages . . . [.]" (Emphasis added). The statute's use of the disjunctive "or" presupposes that the employee has recovered unpaid wages prior to filing a court action under KRS 337.385. Thus, it stands to reason that in most cases the unpaid wages will have been recovered through the Department of Labor (DOL) administrative process

and that the statute contemplates recovery of unpaid wages outside of the judicial process, *followed* by an action pursuant to KRS 337.385.

That, in turn, leads to the posture of this case. To review, the proceedings below were litigated through the DOL administrative process. Kapsalis initiated this matter by filing a wages and hours complaint with the Secretary of the Labor Cabinet. By filing his complaint, he invoked the Secretary's authority to investigate his allegations; and the Secretary did so by and through the Commissioner of the Department of Workplace Standards. *See generally* KRS 336.050 (authorizing the Secretary or its authorized representative to investigate and prosecute matters arising under KRS Chapter 337); KRS 337.010(1)(a) (noting that the Commissioner of the Department of Workplace Standards acts "under the direction and supervision of the secretary of the Labor Cabinet").

Kapsalis's complaint invoked the Secretary's authority to assess civil penalties for any violation of KRS 337.055 – a statute in no way relevant to Kapsalis's status as a "bona fide executive." Indeed, nothing exempts "bona fide executives" from the purview of KRS 337.055.

Also, the source of the Secretary's authority to assess civil penalties for violations of KRS 337.055 is *not* KRS 337.385; rather, it is plainly stated in KRS 337.990(3), which provides:

> The following *civil penalties* shall be imposed, in accordance with the provisions in KRS 336.985, for violations of the provisions of this chapter:
>
> . . .
>
> > (3) Any employer who violates KRS 337.055 shall be assessed a civil penalty of not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) for each offense and shall make full payment to the employee by reason of the violation. Each failure to pay an employee the wages as required by KRS 337.055 shall constitute a separate offense.

(Emphasis added).

In other words, the plain language of this provision identifies two aspects of the Secretary's authority to assess *civil penalties*: The Secretary or his authorized representative are authorized to (1) assess a civil penalty between $100 and $1000; and (2) demand "full payment to the employee" (*e.g.*, restitution) by reason of any violation of KRS 337.055. *Id*. Here, the Commissioner – on behalf of the Secretary – acted well within that authority by assessing Vogt a $250 fine and an amount of restitution consistent with the evidence of record.

Moreover, it is abundantly clear that if and when the Secretary's April 12, 2016 order becomes final,[6] the Secretary would be authorized to file a civil

[6] To reiterate, this appeal merely relates to the propriety of the Secretary's April 12, 2016 order; until that matter is resolved, there can be no enforcement proceedings. *See, e.g.*, KRS 337.075(1).

action on behalf of the Cabinet to enforce and collect both the $250 fine and the demanded restitution (*e.g.*, the "civil penalties") resulting from violations of KRS Chapter 337. *See, e.g.*, KRS 337.075, providing in relevant part:

> (1) A lien may be placed on all property, both real and personal, of an employer who has been assessed *civil penalties* by the commissioner for violations of the wages and hours provisions of this chapter, but not before all administrative and judicial appeals have been exhausted. *The lien shall be in favor of the Labor Cabinet* and *shall be an amount totaling the unpaid wages and penalties due*, together with interest at a rate of twelve percent (12%) per annum from the date the notice of the violation is final, but not before all administrative and judicial appeals have been exhausted. . . .

(Emphasis added). *See also* KRS 336.985, providing:

> (1) The secretary, or any person authorized to act in his or her behalf, *shall* initiate enforcement of *civil penalties* imposed in KRS Chapters 336, *337*, and 339.
>
> (2) Any civil penalty imposed pursuant to KRS Chapter 336, *337*, or 339 may be compromised by the secretary or the secretary's designated representative. In determining the amount of the penalty or the amount agreed upon in compromise, the secretary, or the secretary's designated representative, shall consider the appropriateness of the penalty to the size of the business of the person charged, the gravity of the violation, the number of times the person charged has been cited, and the good faith of the person charged in attempting to achieve compliance, after notification of the violation.
>
> (3) If a civil penalty is imposed pursuant to this section, a citation shall be issued which describes the violation which has occurred and states the penalty for the violation. If, within fifteen (15) working days from the

> receipt of the citation, the affected party fails to pay the penalty imposed, the secretary, or any person authorized to act in his or her behalf, *shall* initiate a civil action to *collect the penalty*. The civil action shall be taken in the court which has jurisdiction over the location in which the violation occurred.

(Emphasis added).

In short, the Secretary is statutorily authorized to assess civil penalties for violations of KRS 337.055, to seek restitution on behalf of unpaid employees, and to initiate enforcement proceedings to collect the same. *See* KRS 337.990(3); KRS 336.985(3). In that respect, the Secretary's statutory authority is roughly analogous to the Attorney General's authority under the Kentucky Consumer Protection Act, KRS 367.110 *et seq*. There, when a consumer believes that he or she has been the victim of an "unfair, false, misleading, or deceptive" act or practice made unlawful by KRS 367.170, the consumer may file a complaint with the Attorney General; the Attorney General is given statutory authority to investigate complaints and bring civil actions for violations of the statute, but has no independent adjudicative authority (*see* KRS 367.240); and like the Labor Cabinet, the Attorney General may also demand restitution on behalf of complainants, along with civil penalties, but must bring a *de novo* action in circuit

court to enforce those demands. KRS 367.190 (civil action); KRS 367.200 (restitution); *see also* KRS 367.990(2) (civil penalties).[7]

Accordingly, Vogt has presented no basis of reversable error.

Before concluding, however, one additional matter that has received undue attention must be addressed. Although the DOL administrative process is clearly set forth in the statutes and bears no relation to KRS 337.385, it appears that Vogt's misunderstanding of that statute – specifically its belief that the Cabinet's enforcement authority derives from it – was contagious. To that end, the Secretary attempted to make two wrongs into a right: It *accepted* Vogt's incorrect premise that its penalty enforcement authority derived from KRS 337.385; but, it further held that restitution and civil penalties could nevertheless be demanded of Vogt through that statute – even though KRS 337.385 does not apply to "bona fide executive" employees – because an "exception" made it so. Consequently, much of the focus of the administrative and judicial proceedings below has been upon whether the "exception" properly applied.

As an aside, the "exception" in controversy is set forth in the below-italicized portion of KRS 337.010(2)(a)2:

[7] For a more detailed discussion of the Attorney General's authority to collect restitution in the context of KRS 367 *et seq.*, as well as the public policy underlying that authority, see *Com. ex rel. Beshear v. ABAC Pest Control, Inc.*, 621 S.W.2d 705 (Ky. App. 1981).

> (2) As used in KRS 337.275 to 337.325, 337.345, and 337.385 to 337.405, *unless the context requires otherwise*:
>
> > (a) "Employee" is any person employed by or suffered or permitted to work for an employer, but shall not include:
> >
> > . . .
> >
> > > 2. Any individual employed in a bona fide executive, administrative, supervisory, or professional capacity, or in the capacity of outside salesman, or as an outside collector as the terms are defined by administrative regulations of the commissioner[.]

(Emphasis added).

With that said, the Secretary offered no explanation in its April 12, 2016 order regarding why the aforementioned "exception" applied, or why *the context required otherwise*. And that is unsurprising: While the Secretary and Commissioner are at liberty to promulgate regulations governing when "the context requires otherwise," they have not done so.[8] To date, the phrase "unless the context requires otherwise" remains undefined and subject to no guiding

[8] "Bona fide executive" is an administrative term of art. The Commissioner of the Department of Workplace Standards (under the direction and supervision of the Secretary of the Labor Cabinet) has the authority to promulgate regulations defining and governing "bona fide executive" employees for purposes of KRS 337.385 and any other provision of KRS Chapter 337. *See* KRS 337.295. The administrative regulations defining who qualifies as a "bona fide executive" are found in 803 KAR 1:070 § 2. But, there remains no administrative regulation governing when "the context requires otherwise," permitting a "bona fide executive" to assert a claim under KRS 337.385.

standards; accordingly, it is difficult to see how that "exception" could ever be applied in a non-arbitrary manner.

In any event, as outlined above there was no cause for the Secretary to engage in any discussion of KRS 337.385 at all, let alone any exception relating to it. More to the point, there was no cause for the Secretary to *apply* the "unless the context requires otherwise" exception, nor was there any cause for the circuit court to *affirm* that aspect of the Secretary's April 12, 2016 order. In that respect, we VACATE. In all other respects, we AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES, LABOR DEPARTMENT OF WORKPLACE STANDARDS AND DAVID A. DICKERSON IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE KENTUCKY LABOR CABINET:

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